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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DUKE GERSTEL SHEARER, LLP, Plaintiff and Appellant, v. DAVID T. PURSIANO et al., Defendants and Respondents.	D068633 (Super. Ct. No. 37-2010-00104285-CU-BT-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Judith F. Hayes, Judge. Affirmed.

Duke Gerstel Shearer, Andrew F. Lloyd and Katherine Dwyer for Plaintiff and Appellant.

Seltzer Caplan McMahon Vitek, Reginald A. Vitek and Andrea N. Myers for Defendants and Respondents.

Duke Gerstel Shearer, LLP (Duke) appeals a judgment in favor of David T. Pursiano and Laurel L. Barry (together Respondents) after the court granted Respondents' motion for summary judgment. Duke contends the superior court erred in finding that

Duke had to first sue its former clients to establish the validity and amount of its attorney fee lien before it could maintain its causes of action for money had and received as well as conversion against Respondents, who replaced Duke as counsel.

The parties agree that although the instant matter is before us on an appeal of summary judgment, the issue presented is a pure question of law. Namely, we must determine if a discharged attorney is required to sue its former client to perfect its attorney fee lien before suing the successor attorneys for claims based on the validity and amount of that lien. On the specific facts before us, we answer that question in the affirmative. As such, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Duke is a San Diego based law firm that maintained satellite offices in Las Vegas, Nevada and Phoenix, Arizona. Eric W. Sachrison, the managing partner of Duke's Arizona office, entered into a written contingency fee agreement with certain homeowners who were members of the class in a construction defect class action in a housing development known as Canyon Ridge. Sachrison filed the original complaint on behalf of these individuals (Canyon Ridge clients) in the Canyon Ridge class action in Arizona Superior Court and managed that case until his sudden death in May 2003.

In June 2003, Pursiano, then a partner in Duke's Nevada office and Barry, then an associate attorney in Duke's Nevada office, resigned from Duke.

Duke claimed that Sachrison's widow (Trinette Sachrison), Arizona attorney Michael N. Poli, Pursiano, and Barry conspired to convince the Canyon Ridge clients to terminate their representation by Duke. In July 2003, the Canyon Ridge clients

terminated their representation by Duke and retained Poli's law firm. Thereafter, Pursiano and Barry, and several other co-counsel appeared pro hac vice in the Canyon Ridge class action. Pursiano and Barry, together with co-counsel Poli, Trinette Sachrison, Stanley G. Feldman, and Joseph L. Oliva, litigated the Canyon Ridge class action for about five years until it was settled on September 23, 2008. Duke was not representing any of the Canyon Ridge clients at that time. On December 5, 2008, then current class counsel, consisting of attorneys Pursiano, Barry, Poli, Feldman, and Oliva, filed a motion seeking costs incurred by all current and former counsel, including Duke, and a 38 percent contingency fee for current class counsel.

The moving party class counsel, including Pursiano and Barry, attached Duke's retainer fee agreements to their motion for fees and costs apparently to show the requested 38 percent contingency fee was consistent with the original retainer agreements as well as the Canyon Ridge clients current retainer agreements. Following the reasonableness hearing, the Arizona Superior Court awarded the moving party class counsel their 38 percent contingency fee. In addition, the court awarded Duke its costs incurred. Although Duke requested that class counsel petition for recovery of Duke's costs from the common fund, there is no indication in the record that Duke requested recovery of its attorney fees directly from the Arizona court or through class counsel.

In November 2010, Duke filed its initial complaint against Respondents, alleging: (1) intentional interference with contractual relations; (2) intentional interference with prospective economic advantage; (3) breach of fiduciary duty; (4) trade secret

misappropriation; and (5) conversion. Duke amended its complaint to add a cause of action for quantum meruit.

Respondents demurred to Duke's first amended complaint, arguing the first five causes of action were barred by statutes of limitation, and the quantum meruit cause of action could not be alleged against them because they were not the clients who received the services. The superior court agreed and dismissed the case after sustaining Respondents' demurrer without leave to amend.

Duke appealed the judgment of dismissal, and this court affirmed in part and reversed in part the judgment. (*Duke Gerstel Shearer, LLP v. Pursiano* (Oct. 4, 2012, D060374) [nonpub. opn.] (*Duke I*).) Relevant here, we determined that Duke should be given the opportunity to allege causes action for conversion and money had and received because the statute of limitations did not bar either claim. Underlying our rationale for providing Duke with another opportunity to plead a valid cause of action was Duke's representation that it could allege a valid attorney lien giving it a right to a share of the contingency fee received by Respondents as well as a specific dollar amount of the fees to which Duke was entitled.

Consistent with our opinion in *Duke I,* Duke filed a second amended complaint with causes of action for money had and received and conversion. Specifically, Duke alleged it had represented the Canyon Ridge clients in the underlying class action under multiple contingency fee agreements that entitled it to a lien on any recovery for attorney fees and costs. Moreover, Duke averred Respondents received attorney fees in the

amount of $1.3 million and paid $100,000 to a creditor of Duke, leaving Respondents with $1.2 million. Duke alleged that it was entitled to those remaining fees.

Respondents successfully demurred to the second amended complaint, but the superior court gave Duke leave to amend to allege a specific dollar amount to which Duke was entitled.

Duke filed a third amended complaint, again alleging causes of action for money had and received as well as conversion. In that complaint, Duke alleged that it was entitled to $1.1 million of the $1.2 million received by Respondents.

Respondents subsequently moved for summary judgment. In doing so, they predominately argued that Duke's claims fail because Duke did not establish the enforceability and amount of the lien on which it based both its causes of action. In its opposition, Duke asserted that it had a contingency fee agreement with its former clients that gave it a lien sufficient to maintain its two causes of action.

The superior court found that Duke could not demonstrate the amount and enforceability of any attorney fees lien with any admissible evidence. As such, the court granted Respondents' motion for summary judgment and subsequently entered judgment in favor of Respondents.

Duke timely appealed.

DISCUSSION

We review summary judgment de novo. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767.) In performing our independent review, we typically apply the same three-step process as the superior court. (*Baptist v. Robinson* (2006) 143 Cal.App.4th

151, 159.) Here, however, the parties agree that there are no material facts in dispute, and instead, we are faced with only questions of law. We thus proceed accordingly.

Duke alleged two causes of action: (1) money had and received and (2) conversion. A cause of action for money had and received arises when one person receives money belonging to another and " 'in equity and good conscience' " should return it. (*Mains v. City Title Insurance Co.* (1949) 34 Cal.2d 580, 586.) The elements of this cause of action require Duke to show that Respondents received a certain sum that should have been paid to Duke. (See *Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925, 937.) Similarly, a cause of action for conversion requires: (1) plaintiff's ownership or right to personal property, (2) defendant's wrongful act toward or disposition of that property; and (3) resulting damages to plaintiff. (*Baldwin v. Marina City Properties, Inc.* (1978) 79 Cal.App.3d 393, 410.) Money can be the property subject to an alleged conversion, but the claim must involve a specific, identifiable sum. (*Vu v. California Commerce Club, Inc.* (1997) 58 Cal.App.4th 229, 235.)

To support both of its causes of action, Duke alleged that it had an attorney fees lien as set forth in its contingency agreements with certain class representatives in the Canyon Ridge class action, whom Duke represented from sometime in 2000 or 2001 until August 2003. As part of the settlement of the Canyon Ridge class action, which occurred in September 2008, Respondents received $1.3 million for their attorney fees. After paying a creditor of Duke $100,000, Respondents were left with $1.2 million, none of which they paid Duke. Duke alleged it was entitled to $1.1 million "based on factors including, but not limited to, the quality and quantity of the work done for the benefit of

the [clients] and the development of the case as compared to the quantity and quality of work done for the benefit of the [clients] and the development of the case by [Respondents]." In short, Duke's causes of action are contingent on possessing a valid lien that entitles it to $1.1 million of the $1.2 million received by Respondents.

"[A]n attorney's lien is not created by the mere fact that an attorney has performed services in a case." (*Carroll v. Interstate Brands Corp.* (2002) 99 Cal.App.4th 1168, 1172 (*Carroll*).) However, an attorney lien can be created by an attorney fee contract with an express provision regarding a lien. (*Ibid*.) Here, Duke points out that its retainer agreements with its former clients specifically referenced the creation of a lien:

> "CLIENT agrees that ATTORNEY shall have a lien for the payment of all attorney's fees and costs due under this agreement, which lien attaches to the fund recovered by ATTORNEY for CLIENT, whether said fund is settlement proceeds, judgment proceeds or any other proceeds. CLIENT acknowledges that ATTORNEY, by virtue of this lien, is entitled to any proceeds or judgment that may be obtained on CLIENT's behalf as security for the attorney's fees due to ATTORNEY under this agreement. CLIENT further agrees and acknowledges that ATTORNEY has the right, by virtue of this lien, to obtain the fees due under this agreement out of the judgment or recovery ATTORNEY obtains for CLIENT as set forth in this agreement."

Further, Duke's retainer agreement called for Duke to be compensated from "the gross monies recovered" consisting of a contingency fee of 31 percent if recovery was obtained more than 30 days before the first scheduled trial date and a 38 percent contingency fee if recovery was obtained 30 or fewer days before the first scheduled trial date.

Yet, the Canyon Ridge clients terminated Duke's services some five years prior to the settlement of the Canyon Ridge class action. Thus, Duke was not entitled to its

contingency fee under either formula. Instead, if anything, Duke was entitled to recover the reasonable value of its services. (*Fracasse v. Brent* (1972) 6 Cal.3d 784, 791; see *Weiss v. Marcus* (1975) 51 Cal.App.3d 590, 598 (*Weiss*) ["where an attorney has been discharged (with or without cause) by a client with whom the attorney had a contingent fee agreement, upon occurrence of the contingency specified in the agreement, the attorney is limited to a quantum meruit recovery for the reasonable value of his services rendered to the time of discharge."].) In fact, Duke's retainer agreement anticipated the event that the client might terminate Duke's services and provided for payment for Duke's services as follows:

> "In the event that ATTORNEY's services are terminated by CLIENT prior to a final resolution of this matter, or in the event that ATTORNEY shall withdraw for 'cause,' then ATTORNEY shall be compensated in a reasonable amount based not only on ATTORNEY's hourly fee rates then in existence for services rendered, but also on ATTORNEY's efforts on behalf of CLIENT and any settlement or award or recovery that CLIENT may obtain from its claims, whether obtained by ATTORNEY, CLIENT or any subsequent attorney. In the event that ATTORNEY and CLIENT cannot agree upon the compensation due to ATTORNEY then the matter of ATTORNEY's compensation shall be submitted to binding arbitration as provided herein below."

Thus, in the instant matter, it appears undisputed that Duke had retainer agreements explicitly referencing the creation of a lien for payment of attorney fees and costs to Duke. Moreover, those same retainer agreements anticipated a possible termination of Duke's services and required Duke to be compensated for the reasonable value of its services as agreed upon by Duke and the clients with any disagreement being decided by arbitration.

Relying on *Mojtahedi v. Vargas* (2014) 228 Cal.App.4th 974 (*Mojtahedi*), Respondents contend that Duke must first establish the validity and amount of its lien by suing its forming clients before it can pursue the instant action. Because Duke did not offer any admissible evidence that established the enforceability and amount of its lien in a previous lawsuit, Respondents argue summary judgment was appropriate.

Duke counters that *Mojtahedi, supra,* 228 Cal.App.4th 974 is not instructive. Instead, relying on *Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38 (*Plummer*), *Weiss, supra,* 51 Cal.App.3d 590, and *Tracy v. Ringole* (1927) 87 Cal.App. 549 (*Tracy*), Duke insists there is no requirement that it first proceed against its former clients to establish the validity and amount of its lien. Thus, the parties agree that Duke has not previously established the validity and amount of its lien by suing its former clients. However, they disagree whether such an action was required for Duke to maintain its claims against Respondents.

Despite framing this issue before us, Duke maintains that this court cannot address it because, in *Duke I*, we implicitly rejected the arguments Respondents raise here. Thus, under the law of the case doctrine (*Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 309), Duke asserts Respondents may not relitigate these previously litigated and resolved issues. The law of the case doctrine provides that an appellate court decision stating a rule of law necessary to the decision of the case conclusively establishes that rule and determines the rights of the parties in any later retrial or appeal. (*Ibid*.) To this end, Duke contends that by determining that Duke could state causes of action for conversion and money had and received in *Duke I*, we rejected Respondents' argument

that Duke's remedy lie against its former clients. Yet, a quick review of the discussion in *Duke I* of Duke's current causes of action undermines Duke's position here.

In *Duke I*, we held that the statute of limitations did not bar a claim of conversion. Moreover, we stated that Duke could allege a valid cause of action for conversion based on its claim that it had an attorney lien giving it a right to a share of the contingency fee received by Respondents as well as its representation it could allege it was entitled to a specific amount of that fee.

Similarly, we determined that the statute of limitations did not bar Duke's claim for money had and received. Again, we stated that Duke should be given leave to amend to state a cause of action for money had and received based on its allegation that it has a lien on a portion of the contingency fee received by Respondents and could allege a specific amount.

In short, our discussion of Duke's possible causes of action for conversion and money had and received was very limited in *Duke I*. We reached our conclusion that the matter should be remanded to allow Duke to plead these two causes action based on Duke's representation that it could plead a valid lien for a specific amount coupled with our determination that the statute of limitations did not bar those causes of action. We did not address any of the issues Respondents raise in the instant appeal. As such, we fail to see how our opinion in *Duke I* would preclude Respondents, under the law of the case doctrine, from raising the arguments currently before us.

Having concluded that the law of the case doctrine does not preclude Respondents from arguing Duke had to first sue its former clients to establish the validity and amount

of its lien, we turn now to that issue. In doing so, we return to Duke's foundational allegations supporting its causes of action for conversion and money had and received. To wit, Duke had a valid attorney fee lien in the specific amount of $1.1 million. Respondents' challenge to these allegations is simple. Before Duke can proceed against Respondents to receive a portion of the contingency fee, Duke must establish the existence of a valid lien and the amount of that lien. To do so, Respondents insist Duke must sue its former clients. (See *Mojtahedi, supra*, 228 Cal.App.4th at pp. 977-978.) Duke took no such action; therefore, Respondents contend summary judgment was warranted.

In *Mojtahedi, supra*, 228 Cal.App.4th 974, the clients retained attorney Michael Mojtahedi to represent them in a personal injury suit on a contingency basis. Mojtahedi's attorney client fee agreement included a provision allowing Mojtahedi to assert an attorney's lien against all claims that were subject to his representation. Eight months after retaining him, the clients discharged Mojtahedi and retained a new attorney, Fernando Vargas. When Vargas settled the case, Mojtahedi wrote to Vargas and requested that any payment to his former clients include Mojtahedi as payee. Vargas deposited the settlement checks into his client trust fund account. All checks included the clients, Mojtahedi's law office, and Vargas's law office as payees. After Mojtahedi and Vargas could not agree on the amount owed Mojtahedi, Mojtahedi brought suit against Vargas, among others, to recover damages. Mojtahedi, however, never sued his former clients to establish the amount of his lien or that the lien was enforceable. (*Id*. at p. 976.)

Vargas demurred to the complaint, arguing that Mojtahedi did not have an enforceable attorney fee lien because he never brought a separate action against the clients to establish the enforceability or amount of his lien. (*Mojtahedi*, *supra*, 228 Cal.App.4th at pp. 976-977.) The superior court sustained the demurrer without leave to amend, and the appellate court affirmed, finding that a discharged counsel must establish the existence, amount, and enforceability of a lien in an independent action against the clients before suing successor counsel. (*Id.* at pp. 977-978; see *Brown v. Superior Court* (2004) 116 Cal.App.4th 320, 328-329; *Carroll*, *supra*, 99 Cal.App.4th at p. 1173.)

Duke asserts that *Mojtahedi*, *supra*, 228 Cal.App.4th 974 is distinguishable because that case as well as the cases on which it relies held that the superior court in the underlying case lacked jurisdiction over the discharged attorney to enforce the lien and determine the amount owed.[1] In contrast, here, Duke maintains that the Arizona court had jurisdiction to award attorney fees to all class counsel and did so when the court made an order providing for aggregate attorney fees into a class fund. (See, e.g., *Roos v. Honeywell Internat., Inc.* (2015) 241 Cal.App.4th 1472, 1490; *Burke v. Arizona State Retirement System* (2003 App.) 206 Ariz. 269, 272-274 [77 P.3d 444, 447-449.) Thus, Duke seems to imply because the Arizona court had jurisdiction to award attorney fees to a class fund from which the class counsel would split the awarded fee among class counsel there was no need for it to bring a separate action to establish the validity and amount of its attorney fees lien. Put differently, Duke appears to argue that the Arizona

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1 See *Brown v. Superior Court*, *supra*, 116 Cal.App.4th at page 328; *Carroll*, *supra*, 99 Cal.App.4th at page 1173; c.f. *Mojtahedi*, *supra*, 228 Cal.App.4th at pages 977-978.

court somehow established the validity of its lien, leaving the amount to be determined by class counsel or a subsequent lawsuit against Respondents. We are not persuaded.

Duke claims that class counsel was not defined, thus, by virtue of it having represented certain class members at some point, it was included in the fees awarded to class counsel. Not so. It is undisputed that Duke did not represent any of the Canyon Ridge clients after 2003. The Canyon Ridge class action settled in September 2008. There is no indication in the record that Duke was involved in the negotiation of the settlement or played any role in the resolution of that case whatsoever. Indeed, it is not disputed that Duke had no involvement in the Canyon Ridge class action for five years before the settlement. Moreover, the class counsel at the time the settlement was achieved filed a motion for the court to award attorney fees. These class counsel submitted invoices of the attorney fees they billed in the Canyon Ridge class action. Duke was not one of the moving counsel. Duke did not submit any invoices to justify its claim for fees. Simply put, there is no indication in the record that Duke asked the Arizona court to award it any fees. Nor did it ask the Arizona court to determine the validity of its attorney fees lien and the amount of that lien. And this failure is all the more damaging to Duke's position here because the Arizona court did award Duke its costs. These costs were specifically set out in the motion for attorney fees, and there is evidence in the record that Duke requested that Poli make sure that Duke's costs were paid for out of any settlement. In contrast, Duke made no such request to Poli (or any of the class counsel) for its attorney fees. If the Arizona court actually had jurisdiction to award Duke attorney fees under its lien as Duke claims, it appears Duke waived its right

to seek such fees by not joining the attorney fees motion or filing some other pleading either requesting its fees or asking the court to determine the validity and enforceability of the lien. (Cf. *Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 315.)

Yet, we do not base our conclusions here on a finding of waiver. In the Canyon Ridge class action, Duke did not seek its fees. Duke did not ask the court to determine the validity and amount of its lien. Moreover, we find nothing in the record that the Arizona court made any ruling whatsoever regarding Duke's alleged attorney fees lien, including its amount. Therefore, we view the class fund established by the Arizona court as no different than the settlement fund that existed in *Mojtahedi*, *supra*, 228 Cal.App.4th 974. As such, we disagree with Duke that *Mojtahedi* is distinguishable from the instant matter because the Arizona court awarded attorney fees into a class fund for class counsel to divide.

Duke also argues that we need not follow *Mojtahedi, supra*, 228 Cal.App.4th 974 because Respondents are judicially estopped from challenging Duke's lien under its retainer agreements because Respondents submitted those retainer agreements in support of their motion for attorney fees in the Canyon Ridge class action. We are not persuaded.

"The elements of judicial estoppel are '(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.' " (*Owens v. County of Los Angeles* (2013) 220 Cal.App.4th 107, 121, citing *Jackson v. County of Los*

Angeles (1997) 60 Cal.App.4th 171, 183.) Although Duke's retainer agreements were submitted as exhibits in support of class counsel's motion for attorney fees, Duke has not pointed to where Respondents, or any of class counsel for that matter, argued the validity and amount of Duke's attorney fees lien. Nor is there any argument in the motion for attorney fees that any fees should be awarded under Duke's retainer agreement. And, as we discuss above, all other class counsel submitted invoices for their attorney fees, and there were no such invoices relating to Duke. With this foundation in mind, we do not see any indication that Respondents relied on the alleged existence of Duke's attorney fees lien to establish Respondents' right to attorney fees in the Canyon Ridge class action. They certainly made no representation to the Arizona court that Duke had a valid attorney fees lien. Accordingly, we determine Duke has not shown that any of the elements of judicial estoppel apply here. Accordingly, we do not decline to follow *Mojtahedi* on these grounds either.

Duke next argues that *Mojtahedi, supra*, 228 Cal.App.4th 974 is not helpful to Respondents because that case did not involve causes of action for conversion and/or money had and received. In *Mojtahedi*, the plaintiff brought suit for fraud, violation of Commercial Code sections 3110, subdivision (b) and 3420, negligence, and tortious interference with prospective economic advantage. (*Mojtahedi, supra*, at p. 976.) However, each of these causes of action was dependent on the plaintiff's assertion that he was entitled to his attorney fees, which was based on the existence of an alleged attorney fees lien. The appellate court found that the plaintiff first had to establish the validity and

amount of the lien before suing the defendants. Further, he had to do so by suing his former clients to establish the validity and amount of the lien. (*Id*. at pp. 978-979.)

Here, although Duke's causes of action differ from those alleged in *Mojtahedi, supra,* 228 Cal.App.4th 974, the premise on which Duke's claims is based is the existence of an attorney fees lien, the same basis as the plaintiff's claims in *Mojtahedi*. Therefore, the fact that the plaintiff did not bring suit for conversion or money had and received in *Mojtahedi* is not a distinguishing factor to the instant matter.

Finally, we do not agree with Duke that the holdings of *Tracy, supra,* 87 Cal.App. 549; *Weiss, supra,* 51 Cal.App.3d 590; and *Plummer, supra,* 184 Cal.App.4th 38 challenge the holding of *Mojtahedi, supra,* 228 Cal.App.4th 974. Although each of the cases relied on by Duke involved a plaintiff bringing suit for conversion and money had and received based on the alleged existence of an attorney fees lien, there is no indication that the defendant in any of those cases argued that the plaintiff had to first establish the validity and amount of the lien by bringing suit against the former client. Stated differently, the issue addressed by the court in *Mojtahedi* was not addressed in *Tracy, Weiss,* or *Plummer*. Thus, we cannot rely on the latter three cases for a proposition not addressed in those cases. (See *Hartwell Corp. v. Superior Court* (2002) 27 Cal.4th 256, 281, quoting *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2 [" '[A]n opinion is not authority for a proposition not therein considered.' "].)

In addition, we do not find *Tracy, supra,* 87 Cal.App. 549; *Weiss, supra,* 51 Cal.App.3d 590; and *Plummer, supra,* 184 Cal.App.4th 38 particularly helpful here in any event. In *Tracy, supra,* 87 Cal.App. 549, "[t]he sole question . . . presented is

whether . . . an attorney may, by contract with his client, provide for a lien upon an anticipated judgment for the amount of his contingent fee." (*Id*. at p. 550.) In that case, in answering the question in the affirmative, the court determined that the plaintiff, an attorney, was entitled to the agreed upon contingency fee despite the plaintiff being fired by his client and being replaced by successor counsel. Such a holding was indirectly overruled by our high court in *Fracasse v. Brent*, *supra*, 6 Cal.3d at page 791.

Likewise, *Weiss*, *supra*, 51 Cal.App.3d 590 is not helpful to Duke. There, a discharged attorney brought an action against his former client and the attorneys who replaced him in the underlying action to recover the reasonable value of his services. In determining that the plaintiff could state a cause of action for conversion and money had and received, the appellate court noted the lien created by a written agreement between the plaintiff and the former client survived the plaintiff's discharge and entitled the plaintiff to the reasonable value of his services rendered prior to his termination. (*Id*. at p. 598.) This conclusion was based solely on the plaintiff's allegations in the operative complaint as well as his allegation that the reasonable value of his services was $6,750. (*Id*. at p. 599.) Much like our opinion in *Duke I*, there was no discussion in that opinion whether the plaintiff first needed to sue his client before bringing suit against the successor attorney. However, unlike the instant matter, the plaintiff in *Weiss* actually named his former clients as defendants.

Lastly, we determine that *Plummer*, *supra*, 184 Cal.App.4th 38 does not support Duke's position here. Although the court in that case mentioned *Carroll*, *supra*, 99 Cal.App.4th 1168, "which requires courts to decide the existence of an attorney's lien in a

separate action subsequent to the action in which the lien is asserted[,]" (*Plummer, supra*, at p. 46), the court did not actually address that issue as framed here and in *Mojtahedi, supra*, 228 Cal.App.4th 974. Instead, the court addressed the foundational issue whether the plaintiff had a direct contractual relationship with the clients giving rise to a lien. (*Plummer, supra*, at p. 47.) In *Plummer*, the retainer agreement indicated that the clients retained the law firm Bisom & Cohen, LLP, but the second page of the retainer agreement indicated that the plaintiff was working on the case in the capacity of " 'Of Counsel' " and thus would be entitled to " '50% of any and all legal fees derived from the representation.' " The agreement further stated that the plaintiff had a lien on any recovery to the extent of any unpaid fees and costs. (*Ibid*.) In finding that a triable issue of material fact existed whether the plaintiff acted as the clients' attorney consistent with a direct contractual relationship or functioned solely as a "behind-the-scenes" agent that would not, the court left unanswered the question if Plummer had to first sue the former clients to establish the validity of the lien.[2] (*Id*. at pp. 47-48.)

In addition, the defendant in *Plummer* argued that the plaintiff did not have a valid lien as a matter of law because the subject retainer agreement violated rule 3-300 of the Rules of Professional Conduct. The court disagreed, finding that a contingency fee agreement need not comply with rule 3-300 to create an attorney fees lien. (*Plummer, supra*, 184 Cal.App.4th at pp. 49-50.)

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[2] Based on the discussion in *Plummer, supra*, 184 Cal.App.4th 38, it does not appear that the defendant argued that the plaintiff's lien was invalid because he did not first sue the former clients. Instead, it argued the plaintiff had no direct contractual relationship with the clients. (*Id*. at pp. 46-47.)

In finding that a triable issue of material fact existed as to the existence of a valid attorney fees lien in *Plummer*, *supra*, 184 Cal.App.4th 38, the court did not address whether a discharged attorney had to first sue its former client to establish the validity and amount of the lien. In fact, that issue was not substantively discussed in regard to the validity of the subject lien. Consequently, we do not find that the holding of *Plummer* contradicts or otherwise undermines the holding of *Mojtahedi*, *supra*, 228 Cal.App.4th 974.

In summary, Duke has not persuaded us that the superior court was incorrect to follow *Mojtahedi*, *supra*, 228 Cal.App.4th 974 and grant Respondent's summary judgment motion. Indeed, on the record before us, we find *Mojtahedi* particularly instructive. Duke claims the Arizona court had the jurisdiction to award it attorney fees as well as determine the validity and amount of Duke's lien. However, it is undisputed that Duke did not move for its attorney fees in the Canyon Ridge class action. Nor did Duke bring a motion in that case to determine the validity and amount of its lien. Having not done so, how was Duke to establish the validity and amount of his lien? *Mojtahedi* provides the answer. Duke needed to sue the Canyon Ridge clients for declaratory relief. (*Id*. at p. 978.) And just such a procedure was contemplated by Duke when it had the Canyon Ridge clients sign the retainer agreements on which it bases its claim of a lien. Those agreements set forth a mechanism by which Duke and the Canyon Ridge clients would determine the reasonable value of Duke's services if the clients were to terminate Duke's representation of them prior to obtaining a settlement. Further, the procedure provided for in the retainer agreements is not much different from what the court required

in *Mojtahedi*. Under the retainer agreements, if the clients terminated Duke's services prior to the resolution of the action, then the clients and Duke would meet and confer to agree on the value of Duke's services. If they could not agree, then the parties consented to submit the dispute to binding arbitration to establish the reasonable value of Duke's services. Thus, even though these retainer agreements were executed some 13 to 14 years before the opinion in *Mojtahedi* was issued, Duke clearly contracted for a similar procedure to establish the amount of its lien that the court found was required in *Mojtahedi*, *supra*, 228 Cal.App.4th at page 978. It is undisputed that Duke has not sued its former clients to establish the validity and amount of its attorney fees lien.[3] Accordingly, we agree with the superior court that summary judgment was warranted.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

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[3] We also observe that nowhere in the record did Duke provide any evidence to support its allegations that the reasonable value of its services was $1.1 million. In essence, Duke, after representing the Canyon Ridge clients for about two years, is asking for about 92 percent of the fees awarded to Respondents, who represented the Canyon Ridge clients for five years. Considering that Respondents' invoices show fees slightly less than $1 million for the five years they represented the Canyon Ridge clients, we struggle to contemplate how Duke could argue its reasonable fees would be greater for representing the clients for less than half the time. When the superior court asked Duke at oral argument the value of its lien, Duke responded that the "actual amount [of the lien] is a question of fact for the jury." In other words, Duke appeared to be arguing that it was entitled to an amount between $0 and $1.1 million. Thus, in regard to Duke's conversion cause of action, Duke's claim of damages was really just a generalized claim for money, not a specific amount as alleged. On this ground alone, Duke's claim is not actionable as conversion. (See *Vu v. California Commerce Club, Inc*., *supra*, 58 Cal.App.4th at p. 235.)

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.